IN THE SUPREME COURT OF THE STATE OF ALASKA

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| In the Matter of the | ) | |
| 2021 Redistricting Plan. | ) | |
| | ) | Supreme Court No. S-_____ |

Trial Court Case No. 3AN-21-08869CI

**ALASKA REDISTRICTING BOARD'S**
**EMERGENCY PETITION FOR REVIEW**

## I. INTRODUCTION

The Redistricting trial is set to begin on Friday, January 21, and today the superior court issued an order that constitutes an unprecedented departure from settled law as to a public entity's right to confidential advice of counsel. This case involves five challenges to the independent Alaska Redistricting Board's ("Board") 2021 Redistricting Plan which reapportions the Alaska Legislature based on the 2020 U.S. Census. The Board seeks immediate appellate review of the superior court's order that requires the Board to turn over communications between it and its constitutionally mandated legal counsel for *in camera* review because plaintiffs have alleged the Board violated the Open Meetings Act. The superior court's order is based on a misreading and breathtaking expansion of this Court's 1993 decision in *Cool Homes, Inc. v. Fairbanks North Star Borough*.[1] Neither *Cool Homes* nor the Open Meetings Act permits the superior court to review attorney-client communications, and neither

[1] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993).



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supports the notion that the Open Meetings Act limits the contents of attorney-client communications in written communications exchanged outside of public meetings.

The superior court below read *Cool Homes* to mean:

> 1. A government body's confidential attorney-client communications sent and received outside of any meeting are not privileged if the communication involves a discussion of a general principle of law.[2]
> 2. A government body's discussion of general principles of redistricting law with its legal counsel during executive session, even in the context of discussion about specific litigation concerns, constitutes a violation of the Open Meetings Act.[3]
> 3. If a government body violates the Open Meetings Act in this way, its attorney-client communications, including emails exchanged before any meeting, are rendered non-privileged.[4]

*Cool Homes* says nothing of the sort. Moreover, the remedy for an Open Meetings Act violation is never waiver of the attorney-client privilege, but instead is the remedy set forth in AS 44.62.310(f). The statute allows an action taken by the body to be voided, if the public-interest factors counsel in favor of that sole remedy in the statute.[5] There is no legal basis for the superior court's order below, and the Board seeks immediate review to protect its right to confidential legal advice from its counsel.

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[2] *See* Order Re Motion for Rule of Law – Attorney Client Privilege, at 14 (Jan. 18, 2022), attached as **Exhibit A**.

[3] **Exhibit A** at 14.

[4] **Exhibit A** at 14.

[5] AS 44.62.310(f).



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The Board seeks immediate review to protect its right to confidential attorney-client communications. Article VI, § 9 of the Alaska Constitution specifies that the Board shall have independent legal counsel. Under AS 15.10.220, the Board's counsel is responsible for defending the Board's proclamation plan. The superior court's order is not only a radical departure from this Court's precedents recognizing the sanctity of the secrecy of attorney-client communications, but threatens the Board's ability, as an institution going forward, to obtain candid legal advice to complete its "Herculean" task of redistricting.[6] The next legal counsel to the Board will choose his or her words very carefully when communicating to the Board, knowing that a politically motivated plaintiff need only *accuse*—without evidentiary support—the Board of misusing executive session to have the finder of fact read through the Board's confidential written attorney-client communications. The Board will be chilled in seeking confidential advice, knowing that the fact finder in inevitable litigation may read that advice. Because the superior court's order below injures the public interest in having the Board complete its difficult task with the benefit of unvarnished, candid legal advice from its constitutionally mandated legal counsel and threatens the Board's work going forward as an institution, the Board respectfully requests this Court grant the petition for review and reverse the superior court's order.

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[6] *Egan v. Hammond*, 502 P.2d 856, 865 (Alaska 1972); *see also Groh v. Egan*, 526 P.2d 863, 875 (Alaska 1974); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1359 (Alaska 1987); *Hickel v. Southeast Conference*, 846 P.2d 38, 50 (Alaska 1992); *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).



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Immediate review is warranted because of the immediate and impending damage the court's order poses. The damage to the Board and public wrought by the court's order will occur as soon as the Board is forced to turn over attorney-client privileged communications to the finder of fact. It cannot be undone by a later ruling by this Court. The superior court cannot forget the contents of the Board's confidential attorney-client communications even if a month or two from now this Court corrects its erroneous application of law. The damage will be irreparable.

## II. BACKGROUND

On November 10, 2021, the Board issued its Final Plan that reapportioned the Alaska Legislature based on the 2020 U.S. Census results.[7] Under Article VI, Section 11, anyone who sought to challenge the Final Plan had until December 10, 2021, to file their challenge.[8] Because redistricting challenges are as sure to occur as death and taxes, on November 19, 2021, nine days after the Board issued its Final Plan, the presiding judges of all of Alaska's judicial districts issued an administrative order regarding judicial assignment of challenges.[9] Ultimately, five plaintiff groups challenged the Final Plan by the 30-day deadline on December 10, 2021.

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[7] *See* Alaska Redistricting Board's Proclamation of Redistricting (Nov. 10, 2021), attached as **Exhibit B**.

[8] Alaska Const. art. VI, § 11 ("Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the board.").

[9] *See* Presiding Judges' Statewide Administrative Order Regarding Redistricting Challenges (Nov. 19, 2021) (available at: https://courts.alaska.gov/jord/docs/2021/statewide-redistricting-challenges.pdf).



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On December 21, 2021, the presiding judge of the Third Judicial District issued a Second Pretrial Order that included the following:

> Any assertion of the attorney-client privilege in response to an initial discovery obligation or a discovery request must be accompanied by a privilege log that that [sic] specifies the documents being withheld. The log must refer to documents by an identifier and Bates stamp pages. The party asserting the privilege must assume that the Court will be asked to review the assertion and prepare copies of the material subject to the assertion for a rapid *in camera* filing.[10]

On December 22, 2021, the case was assigned to Anchorage Superior Court Judge Thomas Matthews, who issued a Third Pretrial Order.[11] The Third Pretrial Order required the Board to, among other things, produce *all* correspondence to or from the Board members and staff regardless of date (from the Board's appointment in 2020 to issuance of its Final Plan in November 2021) or subject matter (from redistricting discussions to lunch orders). Specifically, the Court ordered:

> The Board shall prepare in electronic form for supplementation to the parties all correspondence to or from the board members or staff, excluding only correspondence that is claimed to be protected by attorney client privilege.[12]

The Board undertook the massive effort to comply with these unheard-of pretrial obligations and produced over 100,000 pages of email communications by December

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10 *See* Second Pretrial Order (Dec. 21, 2021), attached as **Exhibit C**.

11 *See* Third Pretrial Order (Dec. 22, 2021), attached as **Exhibit D**.

12 **Exhibit D** at 3 (¶ 9).



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31, 2021.[13] The superior court then issued a Fourth Pretrial Order, with the following requirement:

> The Board shall prepare in electronic form for supplementation by December 31, 2021 to the parties all correspondence to or from the board members or staff, excluding only correspondence that is claimed to be protected by attorney client privilege. For such privilege communications, the Board shall prepare and serve a summary of the communications, identifying in at least general terms the number of documents or communications withheld and the date range. While the Court has not ordered a document by document privilege log at this time, the Board must prepare a separate file of such documents to aid in the resolution of any privilege assertion and for *in camera* filing.[14]

On January 7, 2021, the Board produced a privilege log of the withheld communications. The same day, one plaintiff group—the East Anchorage Plaintiffs—filed a Motion for Rule of Law seeking a ruling (but not a document production) on the scope of attorney-client privilege enjoyed by the Board.[15] Attached to the motion were transcripts from the Board's meetings on November 5, 8, and 9, 2021, prior to its adoption of the Final Plan.[16]

From these transcripts, the East Anchorage Plaintiffs speculated that the Board had improperly used executive session to: (1) discuss with its legal counsel general principles of law regarding redistricting, and (2) vet with its legal counsel new senate

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13 **Exhibit A** at n.66.

14 *See* Fourth Pretrial Order at 5 (Jan. 4, 2021), attached as **Exhibit E**.

15 *See* East Anchorage Plaintiffs' Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities (Jan. 7, 2022), attached as **Exhibit F**.

16 *See* Exhibits A-C attached to **Exhibit F**.



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pairings before the public heard about the pairings.[17] The East Anchorage Plaintiffs attached no evidence that confirmed these accusations—it was just their hunch.

A couple days later, another plaintiff group—the Matanuska-Susitna Borough Plaintiffs—filed a request to join the East Anchorage Plaintiffs' Motion.[18] The Matanuska-Susitna Borough Plaintiffs attached to their joinder request the privilege log that the Board had produced to comply with the superior court's pretrial orders that required the Board to produce—without any discovery request from plaintiffs—all of the Board's communications. The privilege log was a list of over 2,425 emails. The Matanuska-Susitna Borough demanded the superior court order the Board produce for *in camera* review 1,800 of the 2,425 emails.[19] The next day, the Valdez and Skagway Plaintiffs joined the request.[20] The next day after that the Calista Plaintiffs also filed a joinder request.[21]

Two days later on January 12, 2022, the superior court issued an order directing the Board to respond to these motions by January 13, 2022.[22] But before the Board

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17 **Exhibit F** at 2.

18 *See* Mat-Su Borough Plaintiffs' Joinder in Motion for Rule of Law Regarding Scope of Attorney-Client Privilege (Jan. 10, 2022), attached as **Exhibit G**.

19 *See* Exhibit A to **Exhibit G** (on thumb drive, sort by color; yellow is demanded production).

20 *See* Valdez-Skagway Plaintiffs' Joinder in Motion for Rule of Law Regarding Scope of Attorney-Client Privilege (Jan. 11, 2022), attached as **Exhibit H**.

21 *See* Calista Plaintiffs' Joinder in Motion for Rule of Law Regarding Scope of Attorney-Client Privilege (Jan. 12, 2022), attached as **Exhibit I**.

22 Order for ARB Response to Motions for Rule of Law re Scope of Attorney-Client Privilege (Jan. 12, 2022), attached as **Exhibit J**.



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could file its response to the motions on January 13, the Court issued another order for the Board to produce the emails *before* the court ruled on the motions.[23]

Also on January 13, the Board filed its response to the motions.[24] The Board pointed out in its opposition that Plaintiffs had made several errors of law and fact in their motions. Shortly after filing its response, the Board also moved the superior court to reconsider its demand that the Board produce the emails *before* the superior court determined that *in camera* review was appropriate, or, alternatively, asking for a short stay so the Board could seek emergency relief from this Court.[25] The superior court granted reconsideration and directed the Board to prepare for an *in camera* review.[26] The Valdez and Skagway Plaintiffs,[27] the Mat-Su Plaintiffs,[28] and the East Anchorage Plaintiffs[29] filed replies in support of the original motion.

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[23] Order for Production of Privileged Documents for *In Camera* Review and Plaintiff Reply Briefs (Jan. 13, 2022), attached as **Exhibit K**.

[24] *See* Alaska Redistricting Board's Opposition to East Anchorage Plaintiffs' Motion for Rule of Law (Jan. 13, 2022), attached as **Exhibit L**.

[25] *See* Alaska Redistricting Board's Motion for Reconsideration or Alternatively, Motion to Stay Order (Jan. 13, 2022), attached as **Exhibit M**.

[26] *See* Order Granting Reconsideration (Jan. 14, 2022), attached as **Exhibit N**.

[27] *See* Valdez-Skagway Plaintiffs' Reply to Alaska Redistricting Board's Opposition to Rule of Law Motion (Jan. 14, 2022), attached as **Exhibit O**.

[28] *See* Mat-Su Borough Plaintiffs' Response to Alaska Redistricting Board's Opposition to East Anchorage Plaintiffs' Motion for Rule of Law (Jan. 14, 2022), attached as **Exhibit P**.

[29] *See* East Anchorage Plaintiffs' Reply to Opposition to Motion for Rule of Law and Motion to Separately Consider Board's Process and Procedure Allegations at Closing Argument (Jan. 14, 2022), attaches as **Exhibit Q**.



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On Sunday, January 16, the superior court held oral argument on the motion for rule of law. Before the hearing, the Board supplemented its summary of privileged communications and produced additional ones that it had reviewed and concluded were not privileged.[30] After the hearing, the Valdez and Skagway Plaintiffs filed with the Court a Supplemental Authority,[31] and the Board submitted its public meeting policy.[32]

On January 18, the superior court issued the Order that the Board seeks relief from in this petition for review.

## III. DISCUSSION

The Board seeks immediate relief from this Court to shield its confidential attorney-client communications from the eyes of the finder of fact below. The superior court's order requires the Board to produce confidential communications between counsel and the Board. That relief is an astounding departure from black-letter law that has shielded attorney-client communications for centuries. Plaintiffs' and the Board's arguments are included in their respective filings below, attached hereto. The Board does not repeat them here but highlights the points.

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[30] Alaska Redistricting Board's Notice of Service of New Summary of Privileged Communications (Jan. 16, 2022), attached as **Exhibit R**. The spreadsheet marked as Exhibit A to the Notice of Service is on the thumb drive filed herewith).

[31] *See* Valdez-Skagway Plaintiffs' Supplemental Authority letter to Judge Matthews and Clerk of the Trial Courts (Jan. 16, 2022), attached as **Exhibit S**.

[32] *See* ARB's Notice of Filing Policy Requested During Oral Argument (Jan. 16, 2022), attached as **Exhibit T**.



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*First*, the superior court misstates the law of attorney-client privilege. Pursuant to Alaska Evidence Rule 503, any confidential communication between a client and a lawyer, made to facilitate professional legal services, is privileged. In *Griswold v. City of Homer*, this Court expressly held that public entities are entitled to the privilege.[33] The Open Meetings Act does not amend, alter or apply in any way to the privilege that applies to written communications by counsel to client done outside of public meetings. Nor does the statutory remedy in AS 44.62.310(f) say anything about waiver or disclosure of attorney-client communications.

*Second*, it is in the public interest for the Board to have confidential legal discussions with its counsel. As this Court has noted in affirming the government's right to confidential legal advice, the "common law has long recognized the privileged nature of attorney-client communications and attorney work-product. . . ."[34] and that "it is clearly in the public interest for a governmental agency to be able to receive

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[33] *Griswold v. Homer City Council*, 428 P.3d 180, 187 (Alaska 2018).

[34] *See id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961))); *Hickman v. Taylor*, 329 U.S. 495 (1947) (recognizing the work-product privilege for litigation); *Langdon v. Champion*, 752 P.2d 999, 1004 (Alaska 1988) (explaining that "[t]he 'work product doctrine,' first recognized [in *Hickman*], is part of Alaska's Civil Rule 26(b)(3)." (footnote omitted)); *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 31–33 (Alaska 1974) (applying common law attorney-client privilege); *Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368, 1376-80 (Vt. 1990) (applying the common law work-product privilege to the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, § 317(b)(4) (1989)).).



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confidential advice from its attorneys."[35] That is certainly true of the Board, which is comprised of five different Alaskans every ten years to engage in the Herculean effort of legislative reapportionment in Alaska.

*Third*, the superior court appears to be ordering production of privileged documents for *in camera* review based on a statute that does not apply to the independent Alaska Redistricting Board and based on a remedy not available under Alaska's Open Meetings Act, even if it did apply to the Board. Specifically, Plaintiffs cite to this Court's decision in *Cool Homes, Inc. v. Fairbanks North Star Borough*,[36] in which this Court noted that Alaska's Open Meetings Act required additional transparency from governmental bodies *during public meetings*. But, this Court has never determined that the Act applies to the Board, which was created in 1998 by a constitutional amendment that made it independent of all three branches of government, subject to the provisions of Article VI of the Alaska Constitution. The Court has since

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[35] *Griswold*, 428 P.3d at 187-88 (citing *Gwich'in Steering Comm. v. Office of the Governor*, 10 P.3d 572, 578 (Alaska 2000) (recognizing that certain disclosures "would deter the open exchange of opinions and recommendations" and that certain privileges are necessary "to protect the executive's decisionmaking process, its consultative functions, and the quality of its decisions"); *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1323 (Alaska 1982) (recognizing "the interest of the public in having the business of government carried on efficiently and without undue interference" (quoting *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421 (Or. 1961) (en banc))); *City of Orlando v. Desjardins*, 493 So.2d 1027, 1029 (Fla. 1986) (noting "the imbalanced posture and the disadvantaged status of public entities" without the benefit of attorney-client privilege); *Killington*, 572 A.2d at 1379 (stating that not recognizing work-product privilege "would produce an anomalous and unfair result").).

[36] *Cool Homes, Inc. v. Fairbanks North Star Borough*,860 P.2d 1248, 1259-62 (Alaska 1993).



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then *assumed* it applied because it did not have to reach that issue because no relief was warranted based on a violation of the Act,[37] but it has never decided that issue. The Board is not subject to the Act because it is independent of the Legislature. Otherwise, the Legislature could pass laws that added requirements beyond Article VI that, for example, required the Board to shield incumbents or draw election districts based on the results of prior elections.[38]

*Fourth*, even if the Act did apply to the Board, its statutory provisions say nothing about waiver of attorney client privilege. The Act specifies the remedy available for a violation of its provisions:

> Action taken contrary to this section is voidable. . . . If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action.[39]

Nowhere does the Act specify that an alleged improper use of executive session should result in disclosure of what was communicated during that executive session, let alone that the Act should apply to limit the content of attorney-client communications made

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[37] *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (*assuming* that the Open Meetings Act applied to the Board and refusing to void the redistricting plan).

[38] *See generally Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987) (holding that the legislature was not subject to the Open Meetings Act under the separation of powers doctrine). As an independent state entity, the Alaska Redistricting Board is beholden to Article VI, but is not subject to rulemaking by the legislature.

[39] Alaska Stat. 44.62.310(f).



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before or after a public meeting. Neither the Plaintiffs nor the superior court identified a case from anywhere in America interpreting a state's open meeting act to require disclosure of confidential attorney-client communications. Importantly, the Alaska Supreme Court refused to invalidate actions of the Governor's Reapportionment Board back in the 1990s when the Board was part of the executive branch and subject to the Open Meetings Act because it reasonably concluded that voiding the action of the Board based on a meetings violation would be a disproportionate remedy.[40] None of the cases cited by Plaintiffs support their unheard-of conflating of open meetings law with waiver of attorney-client privilege.[41]

[40] *Hickel v. Southeast Conference*, 846 P.2d 38, 57 (Alaska 1992); *see also In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (assuming that the Open Meetings Act applied to the Board and refusing to void the redistricting plan).

[41] None of the following cases direct the government to disclose what occurred in an executive session because that executive session was improperly held: *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984); *Minneapolis Star & Tribune Co. v. Housing and Redevelopment Authority*, 246 N.W.2d 448 (Minn. 1976); *Oklahoma Associations of Municipal Attorneys v. Oklahoma*, 577 P.2d 1310 (Ok. 1978); *City of San Antonio v. Aguilar*, 670 S.W.2d 681 (Tex. App. 1984); *Hui Malama Aina O Ko'olau v. Pacarro*, 666 P.2d 177 (Haw. App. 1983); *Channel 10, Incorporated v. Independent School District No. 709*, 215 N.W.2d 814 (Minn. 1974).

The only case cited by Plaintiffs that orders production of information from an improper executive session is *Detroit News, Inc. v. Independent Redistricting Commission*, 2021 WL 6058031, *14 (Mich. Dec. 20, 2021). But, as explained above, that case was about Michigan's new constitutional amendment that abrogated any right to attorney-client privilege and the remedy in that case was based on the Michigan Constitution, not an open meetings act statute: "To remedy these violations of the Constitution, we order production of the recording of the October 27 meeting and seven memoranda noted above.") (emphasis added). Alaska's Open Meetings Act provides no such remedy.



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*Fifth*, the superior court's automatic *in-camera* review provision is a departure from this Court's precedent. As the U.S. Supreme Court has cautioned, "[t]here is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents."[42] Before a court will engage in an *in camera* review "'the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person,' *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982), that *in camera* review of the materials may reveal evidence to establish the claim that the [privilege] exception applies."[43] The Alaska Supreme Court has heightened this requirement by adding a relevance requirement to the sought-after but withheld documents: "On appeal, Christensen cites no authority to justify requiring the court to conduct an *in camera* review of discovery documents withheld by a party on grounds of privilege, even when, as here, the assertion of privilege is facially valid, no specific basis for challenging the privilege is established, *and no specific need for disclosure is shown.*"[44]

Plaintiffs have not met this standard. Instead they seek to enlist the superior court on a fishing expedition through the Board's correspondence with its attorney and correspondence in which its attorney's advice was passed on by a member or staff to another within the Board. The order requires the Board to produce all emails pertaining

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42 *United States v. Zolin*, 491 U.S. 554, 571 (1989).

43 *Id*. at 572.

44 *Christensen v. NCH Corp.*, 956 P.2d 468, 474 (Alaska 1998) (emphasis added); *Central Const. Co. v. Home Indemnity Co.*, 794 P.2d 595, 598-99 (Alaska 1990).



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to the Board's redistricting work during the time period it adopted its Final Plan: November 1-10, 2022, regardless of whether the email was sent during a meeting of the Board at all. The superior court also indicates the Board is not entitled to attorney-client privilege about general legal principles, even though such communications plainly fall within the definition of privilege under Evidence Rule 503.

*Finally*, the stakes of the court's ruling on *in camera* review are heightened because this is a redistricting case. In redistricting cases, the court serves as the trier of fact.[45] Future counsel and future Boards will be forever chilled from exchanging candid, unvarnished legal advice if the precedent has been set that the finder of fact in the all-but-assured litigation that follows the redistricting process will have access to attorney-client communications if any challenger simply disputes the privileged nature of the communication or speculates that an Open Meetings Act violation may have occurred.

## IV. CONCLUSION

For the foregoing reasons, the Board respectfully requests this Court grant its petition for review and reverse the superior court's order that the Board produce its attorney-client communications to the finder of fact below for *in camera* review. Absent immediate intervention by this Court, the public will be injured by the superior court's ruling because it will chill all future Board-attorney communications. Article VI, Section 9 requires the Board to obtain independent counsel for a reason:

[45] *See* Alaska R. Civ. P. 90.8(f).



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redistricting Alaska is a complicated task that requires advice about how best to comply with the Alaska constitution. The superior court's order invades the attorney-client privilege based on a misreading of *Cool Homes* and an incorrect application of the Open Meetings Act to written communications not done during a public meeting.

Trial is set to commence January 21, 2022. The Board respectfully requests that the Court grant immediate review, and either issue a decision based on review of the briefing and order below (all attached hereto), or that it direct immediate responses by opposing parties so that a decision can be made by January 19 or 20. If such prompt review is impossible, then the Court should direct a short stay of the superior court trial until this fundamental issue of law can be addressed by this Court.

DATED at Anchorage, Alaska, this 18th day of January, 2022.

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